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BY ECF

December 8, 2021

Re: **United States v. Burgess, et al., 18 Cr. 373 (RJS)**

Honorable Richard J. Sullivan
United States District Judge
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007-1312

Dear Judge Sullivan:

Pursuant to the Court's September 27, 2021 Memo Endorsement (ECF No. 868), we represent Ernest Murphy in the above-captioned matter as appointed counsel in connection with Mr. Murphy's contemplated filing of a Rule 33(b)(1) motion.

Since being appointed by the Court, we have spoken with Mr. Murphy and his family regularly by telephone, and have reviewed the transcripts of Mr. Murphy's August 2019 trial and associated trial exhibits. We have also reviewed the January 5, 2018 post-arrest video of Tyquan Robinson produced to Mr. Murphy by the Government on June 24, 2021 – more than a year after his conviction and months after his appeal was filed – despite the January 5 arrest being introduced at trial *and* the fact that the statement contains exculpatory evidence relating to our client, in violation of the Government's obligations under *Brady v. Maryland* and its progeny. Additionally, our review of the trial record brought to our attention (i) the ongoing issue of belated Rule 16 productions, for some of which the Government made (on the literal eve of trial) the representation that the production contained no *Brady* (see, e.g., Aug. 12, 2019 Trial Tr. 2:19 – 4:2), and (ii) the fact that the Government introduced at trial multiple acts of violence, for which it is unclear what discovery was produced in advance of trial.

Presently, we are (i) reviewing the late produced discovery (for which the representation was made that there was no *Brady*); (ii) reviewing cover letters for the Rule 16 productions (which the Government provided on 12/7/2021, in response to an earlier request), given the limitations of the material provided to us from Mr. Murphy's previous defense counsel; and (iii) waiting to receive confirmation from the Government that they reviewed any and all arrest files in connection with the acts of violence introduced at trial,

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and that, if any post-arrest statements were made, those statements were either produced previously or are being turned over now. Essentially, we are working with the Government to ensure that Mr. Murphy has a record of all Rule 16 and/or *Brady* material that either was produced, or should have been produced. Accordingly, while we have already identified at least one *Brady* issue to support Mr. Murphy's request for a new trial, we request a somewhat modest extension of time to run down any additional issues before we file his Rule 33 motion.

We propose the following revisions to the briefing schedule, which the Government has agreed is acceptable:

- January 21: Mr. Murphy files his Rule 33(b)(1) motion (previously December 17).
- February 25: The Government files its opposition brief (previously January 21).
- March 11: Mr. Murphy files his reply brief (previously February 11).

We thank the Court for its consideration of this proposal.

Respectfully submitted,



Brooke E. Cucinella

cc: AUSA Elinor Tarlow (*by ECF*)
AUSA Jun Xiang (*by ECF*)
AUSA Matthew Hellman (*by ECF*)

The defendant's request for a revision to the briefing schedule is GRANTED. IT IS HEREBY ORDERED THAT the defendant shall file his Rule 33 motion by January 21, 2022; the government shall file its opposition brief by February 25, 2022; and the defendant shall file his reply brief by March 11, 2022.

SO ORDERED:

Date: December 10, 2021



Richard J. Sullivan
U.S.C.J., Sitting by Designation